SINGAPORE REPORTS

Re Yap Peter

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 830 OF 1988
WEE CHONG JIN CJ, LAI KEW CHAI AND YONG PUNG HOW JJ
25 SEPTEMBER 1990

Legal Profession — Disciplinary proceedings against advocate and solicitor — Whether 'complaint' under s 80(2) of Legal Profession Act exists — Whether instructing solicitor liable for payment of Queen Counsel's fee — Fee agreed to be negotiated — Whether solicitor liable for fee not negotiated — Contract of honour — Legal Profession Act (Cap 161, 1985 Ed), ss 80(2)(g), (h) & 95(1)

The respondent, an advocate and solicitor of the Supreme Court, was charged and found guilty by the Disciplinary Committee of the Law Society of Singapore of grossly improper conduct in the discharge of his professional duty by failing to pay to the complainant, who was a Queen's Counsel, a fee of £50,000 raised in his fee note of 4 April 1986. It was agreed that the complainant was to be retained in respect of TKS, who was to appear at a criminal trial on 5 May 1986. An order nisi was made to discipline the respondent under s 80 of the Legal Profession Act (Cap 161, 1985 Ed) and he was ordered to show cause why he should not be dealt with accordingly.

After the retainer for the complainant was confirmed on 3 March 1986, the respondent informed RK, the complainant's clerk, by telephone on 26 March 1986 that he was not ready to have consultations with the complainant yet as negotiations on behalf of TKS was still continuing.

On 25 March 1986, upon enquiry by RK, the respondent denied that another counsel had been retained for TKS. On 4 April 1986, the respondent received a fee note for the sum of £50,000 being the brief fee for the complainant. On 28 April 1986, the respondent wrote to RK stating that two weeks or so after the respondent's telex on 3 March 1986, the respondent had informed RK by telephone that the complainant would not be required for the case. Up to that time, no papers had been delivered to the complainant, the respondent had no consultations with him and no opinion had been delivered by him. The respondent refused to pay the complainant the sum under the fee note. By an action in the High Court, the complainant claimed his fee based on the respondent's alleged breach of contract. The allegations were that the respondent had retained another counsel and deceived the complainant when asked about it.

The complainant also filed a complaint to the Law Society against the respondent who was faced with four charges which were that the respondent had failed to pay the agreed fee of £50,000 to the complainant; the respondent had retained CN, another counsel for the defence of TKS's case and did not inform the complainant when he was subsequently retained; the respondent retained the complainant to defend TKS without first discharging CN; and the respondent lied to and misled the complainant into believing that CN was in fact not retained. The Disciplinary Committee found the respondent guilty on the first charge but not guilty on the last three as no evidence was led on them.

The Disciplinary Committee found that there was a binding agreement between the respondent and RK, as clerk on behalf of the complainant. It was also found that there was an understanding that if TKS's trial was not proceeded with, the brief fee would be renegotiated and the respondent could ask for a reduction; the respondent failed to inform the complainant that his services would not be required; and the respondent was obliged but failed to pay the agreed fee nor even a reduced fee which the complainant was prepared to accept. The Committee thereupon found that the respondent's failure to pay the complainant's fee was sufficiently grave to warrant disciplinary action.

Held, discharging the order nisi to show cause:

(1) There is a rule of law of long antiquity that there is no contractual relationship between a barrister and either the instructing solicitor or the client upon which he can sue. It is a contract of honour. It was surprising that the complainant had instituted legal proceedings to recover his fees.

(2) The respondent should have informed the complainant as soon as it became reasonably clear that his services were no longer necessary. The delay in doing so was inconsequential and this would only have increased the amount of the complainant's fee to be negotiated.

(3) The respondent had a duty to negotiate but the intransigent and uncompromising attitude of the complainant left no room for any meaningful negotiations. The complainant was under a duty of honour to negotiate in view of the fact that the criminal case against TKS did not proceed to trial.

(4) The Disciplinary Committee, in spite of their finding as a fact that there was a term in the retainer that the fee was to be negotiable if the matter did not proceed to trial, did not take into consideration the failure and refusal of the complainant to negotiate with the respondent. Instead, they misdirected themselves by finding that the respondent had failed to pay the agreed fee of £50,000.

(5) The misfortune of the respondent stemmed from a failure on the part of the complainant in conceding or at least mentioning at the first available opportunity that it was agreed that the fee would be negotiable if the case did not proceed to trial.

(6) In a contract of honour, it is as much a matter of honour to pay as it is no less a matter of honour to negotiate in the event of a condition subsequent coming to pass. The respondent never failed to pay the fee because it was never payable.

(7) The complainant did not keep his side of the contract of honour as he failed to negotiate in any meaningful way and that stood in the way of a settlement of a reasonable amount of fee. Therefore the respondent had conclusively shown why he should not be dealt with under the Act. Also, there should be no order as to costs.

Cases referred to

1 *Morris* v *Hunt* [1819] 1 Chit 544 (folld)
2 *Re Le Brasseur and Oakley* [1896] 2 Ch 487 (folld)
3 *Rondel* v *Worsley* [1969] 1 AC 191 (folld)
4 *Kennedy* v *Broun* (1863) 13 CB (NS) 677; 143 ER 268 (folld)
5 *Rondel* v *Worsley* [1967] 3 WLR 1666 (folld)

Legislation referred to

Legal Profession Act (Cap 161, 1985 Ed) ss 80(2)(b), (h), 95(1)

Lee Han Yang for the respondent.
KS Rajah for the Law Society of Singapore.

Cur Adv Vult

Lai Kew Chai J (delivering the judgment of the court): The respondent, an advocate and solicitor, was charged before and found guilty by the Disciplinary Committee of the Law Society of grossly improper conduct in the discharge of his professional duty within the meaning of s 80(2)(b) or, alternatively, s 80(2)(h) of the Legal Profession Act (Cap 161, 1985 E) ('the Act'). The Disciplinary Committee found him guilty of having failed to pay the agreed fee of £50,000 to a Queen's Counsel as raised by the QC's fee note of 4 April 1986. In the course of these proceedings before us, it was incontrovertibly clear that the Disciplinary Committee had found that a condition of the retainer, as agreed between the respondent and the clerk of the QC, was that if the criminal case for which the QC was retained did not proceed to trial, the parties would then negotiate the amount of fees payable. In the event, the criminal case did not proceed to trial as the lay client, one Tan Koon Swan, eventually pleaded guilty to the offence of criminal breach of trust. As it transpired, and it was beyond dispute, neither the QC nor his clerk had attempted to negotiate with the respondent in any meaningful way. We came to the conclusion that the QC did not keep his side of the agreement of honour. We accordingly declared that the respondent had conclusively shown why he should not be dealt with under the Act and ordered, however, that there be no order as to costs in the High Court or before the Disciplinary Committee.

The respondent is an advocate and solicitor of 18 years standing and the sole proprietor of his firm. He was retained by Tan Koon Swan who had been charged with several serious offences arising out of the collapse of the Pan Electric group of companies. On 12 February 1986 the respondent telephoned Mr Roy Kemp, the managing clerk to Mr Gilbert Gray QC to retain Mr Gray to lead the defence of Tan Koon Swan. The trial was scheduled to commence on 5 May 1986 and was expected to continue for five weeks. Mr Kemp informed the respondent that Mr Gray could be made available provided the respondent could confirm the retainer as Mr Gray had another cause celebre, the 'Brighton Hotel Bombing' case in London, which would clash with the dates on which he was required in Singapore. Mr Kemp was prepared to return that brief if the respondent would confirm the retainer. By a telex sent on 3 March 1986 the respondent confirmed the retainer. Upon receipt of the confirmation Mr Kemp returned the briefs covering the relevant period, including the brief for the 'Brighton Hotel Bombing' case.

We turn to the terms of the retainer. Mr Gray's brief fee was £50,000 with a refresher of £1,500 per day, plus the usual expenses which included a return air ticket, hotel expenses, meals and incidental expenses. It was also agreed that Mr Gray would be available for three weeks before the trial for pre-trial consultations but only those consultations held during the week before the trial would be covered by the agreed brief fee. It was only at the hearing before the Disciplinary Committee in April 1988 that an important term of the retainer emerged. Mr Kemp, the only witness called by the Law Society, in his evidence disclosed for the first time that after his receipt of the respondent's telex of 3 March 1986 he had agreed with the respondent that the agreed brief fee would be negotiated if the criminal trial of Tan Koon Swan did not proceed. We set out his evidence as follows:

> When I received Mr Yap's telex of 3 March 1986 I had a telephone conversation (with the respondent) and he agreed that the brief fee would become payable. I think it is fair to say that at that point, he did mention there was a very slim chance of the case, that the case may not go ahead as a trial. He said that there were negotiations going on at government level to endeavour to resolve the matter and he asked if there would be any reduction in the fee should the case go short — if Mr Gray need not go to Singapore.
>
> My reply was, that would depend on what point of time he said that Mr Gray would not be required. I think it was actually said that if it happened in the next week or so that we may be able to agree to half the brief fee. It would really depend on how near to the actual date it was; the nearer one got to the actual trial date obviously the shorter the time to replace his work with other work.

On 21 March 1986 Mr Kemp telephoned the respondent and informed him that Mr Gray had completed a case in Singapore and asked whether the respondent was in a position to deliver the papers to Mr Gray or have a consultation with him. The respondent replied that he was not in a position to have consultations yet as negotiations were still continuing; these negotiations must have been intensive seeing that the trial of Tan Koon Swan was scheduled to begin on 5 May 1986. The respondent did not terminate the retainer of Mr Gray.

What followed was a most unfortunate misunderstanding which, as will be seen, was the fons et origo of the dispute between Mr Gray and the respondent and the reason why the matter was not more sensibly resolved. On 25 March 1986 Mr Gray who was in Singapore obviously acted on what he had heard through the grapevine and telephoned the respondent and asked the respondent if another counsel had been engaged. This the respondent denied. The respondent told Mr Gray that the matter was being settled and that his services were no longer required. According to the respondent, who was not contradicted by Mr Gray, he told Mr Gray that he would negotiate the fee payable as the matter was settled; Mr Gray appeared to have accepted the decision and had asked him to talk to Mr Kemp about it. Towards the end of March 1986 Mr Gray rang the respondent again. He sounded very annoyed and accused him of having engaged another counsel to lead the defence in his place. The respondent told Mr Gray that his client, a man with many connections, was consulting with or was referred to many QCs over his many matters. The respondent also told

Mr Gray that as far as he was concerned if the matter had gone for trial, Mr Gray would lead the defence. Mr Gray did not appear convinced. The respondent said in evidence: 'He was very loud in his discussion with me. I was getting quite upset by the manner that the conversation was going.'

Kemp then told the Disciplinary Committee:

> When Mr Gray returned to England and as a result of what he told me I spoke to a clerk in the chambers of Mr Clive Nicholls QC and his clerk confirmed that Mr Nicholls together with a junior barrister from his chambers had been advising, in fact had been booked by Mr Yap in mid-February, and Mr Nicholls had been advising at various times between then and April — Mr Nicholls I think was in a case in Hong Kong at the time and had flown across here on several occasions to advise — the junior barrister had in fact been in Singapore advising Mr Yap and his client for the last four weeks as at that time, I think he had also been in Kuala Lumpur. Mr Nicholls had been in Singapore but not for the whole period because he was in a case in Hong Kong. He had flown across, I am not sure for what period, but he had certainly been here to advise.

It was obvious that what Mr Kemp was told by the clerk of another set of chambers was entirely hearsay evidence. The respondent was not contradicted in his evidence that Mr Clive Nicholls was never engaged to lead the defence of Tan Koon Swan and that Mr Gray was chosen by the lay client to lead the defence since he had experience appearing in the courts in Singapore.

On 4 April 1986 Mr Kemp wrote to the respondent enclosing a fee note for the brief fee of £50,000. The letter was in these terms:

> Peter Yap & Co
> Advocates & Solicitors
> 14 Robinson Road #02-01/02
> Far East Finance Building
> Singapore 0104
>
> 4 April 1986
>
> Dear Mr Yap
>
> Re: Tan Koon Swan
>
> In mid-February you contacted me by telephone enquiring if Mr Gilbert Gray QC would be available to conduct a criminal case on behalf of the above-named. Several telephone calls followed when fees were agreed and eventually you confirmed the engagement of Mr Gray. This was confirmed by telex dated 3 March 1986.
>
> During the course of these telephone conversations I confirmed that Mr Gray could be made available for up to three weeks prior to the hearing as well as for the hearing itself but that as I had promised solicitors in England decisions on Mr Gray's availability during this period in particular a brief in the Brighton Hotel bombing case, I asked for your confirmation as soon as possible.
>
> As a result of your telex of 3 March I have kept Mr Gray clear for a period of eight weeks and declined several briefs which have been offered.
>
> On 21 March I telephoned to advise you that Mr Gray had completed his case in Singapore and was now available if you required consultations.
>
> You advised me that you were now hopeful that the case would be settled and Mr Gray may not now be required.
>
> Before Mr Gray left Singapore on 2 April he contacted you and discussed the situation with you. He expressed his concern because he had heard that another silk from England had been instructed and you said that this was not the case.
>
> I am now told that Mr Clive Nicholls QC and a junior from his chambers were instructed by you in February and have been advising in the case since then. Indeed the junior has been with you in Singapore and Kuala Lumpur for the last four weeks.
>
> In the circumstances I enclose a fee note for the agreed brief fee and I should be obliged if you would arrange for payment by 30 April 1986.
>
> Yours faithfully,
>
> R Kemp
> Clerk to Mr G Gray QC

On 28 April 1986 the respondent replied as follows:

> Peter Yap & Co
> Advocates & Solicitors
>
> 28 April 1986
>
> Mr Roy Kemp
> 2 Park Square
> Leeds LS1 2NE
> United Kingdom
>
> Dear Sir
>
> Tan Koon Swan
>
> I refer to your letter dated 4 April 1986.
>
> You will recall that when we were discussing the fees for Mr Gilbert Gray QC I indicated quite clearly to you that in the event there was a likelihood of settlement of the case before papers were handed over to Mr Gray, we would have to discuss the appropriate fee, if any, to be paid by client. The hearing was to commence on 5 May 1986 and was expected to last five weeks. The brief fee of £50,000 would also include a pre-trial conference in Singapore for three weeks without refresher.
>
> Some two weeks or so after my telex to you of 3 March 1986 I informed you by telephone that Mr Gray would not be required for the case. Up to that point of time, no papers had been delivered to him. I had no consultation with him on the case and received no opinion from him. Mr Gray telephoned me some time after my telephone conversation with you, when he was in Singapore on some other matter, and I confirmed to him what I spoke to you previously on the phone that his services will no longer be required. As for the other matters raised by you in your letter, I reserve my comments.
>
> In view of the premises, I do not see how you could send me a fee note of £50,000.
>
> Yours faithfully
>
> Sgd Peter Yap

The above exchange of correspondence was followed by Mr Gray's suit instituted in the High Court against the respondent for the recovery of the agreed brief fee. By paras 10 and 11 of the statement of claim, it was averred

by Mr Gray that the respondent's statement that no other counsel had been instructed for the case 'was false' as another leading counsel, Mr Clive Nicholls QC, had been instructed for the defence of Tan Koon Swan prior to 25 March 1986 and that an English barrister had also been instructed as junior counsel. The claim was based on breach of contract and there were serious allegations that the respondent had replaced Mr Gray with another leading counsel without prior notice and had deceived Mr Gray when asked about it. It was surprising that Mr Gray had instituted legal proceedings to recover his fees because there is, as he and every counsel ought to know, a rule of law of long antiquity that there is no contractual relationship between a barrister and either the instructing solicitor or the client upon which he can sue; it is a contract of honour: see *Morris* v *Hunt*;[1] *Re Le Brasseur and Oakley*[2] at p 494, per Lindley LJ; and *Rondel* v *Worsley*[3] at pp 236, 261, 278 and 287.

In *Kennedy* v *Broun*[4] Erle CJ said at p 727 that:

> ... a promise by a client to pay money to a counsel for his advocacy, whether made before, or during, or after the litigation, has no binding effect; and, furthermore, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation.

Referring to all previous records of the law Erle CJ noted at p 728:

> ... there is no trace whatever either that an advocate has ever maintained a suit against his client for his fees in litigation, or a client against an advocate for breach of contract to advocate.

The *Kennedy* v *Broun*[4] rule of law was affirmed by the House of Lords in *Rondel* v *Worsley*.[5] Lord Upjohn said at pp 1716-1717:

> ... it is clear that counsel cannot sue for his fees. This has been established for nearly two hundred years and it is usually put upon the ground that a barrister is of too high an estate to condescend to the common arena to sue his client. Fees must be regarded as pure honoraria ... . It is true that Bayley J in *Morris* v *Hunt* [(1819) 1 Chit 544] put it on a more realistic though humdrum basis that counsel should ensure that he is paid before the case and the matter should not be left to chance afterwards, so that he cannot thereafter maintain an action; not a very good reason. Best J in the same case really put the inability of counsel to sue upon the ground of public policy, namely, that counsel should not thereby have any temptation to endeavour to get a verdict. However, whatever reason may be ascribed it is clear that counsel cannot sue for his fees ...

Inevitably, Mr Gray's suit was dismissed with costs on the ground that there was no reasonable cause of action.

Mr Gray thereafter filed a complaint with the Law Society of Singapore against the respondent. By his letter of 30 January 1987 to the Law Society he enclosed his statutory declaration in support of his complaint and the exhibits, including the cause papers, which he hoped would adequately set out the nature of his complaint. The complaint so far was not only for failure to pay his fees but it also included allegations that another counsel had been engaged and deceit.

We have to note, and it should have been noted, that up to this stage of the proceedings Mr Gray did not refer to the agreement between Mr Kemp and the respondent that if the criminal case did not proceed to trial both parties were obliged to negotiate a reasonable fee. His claims so far were based on breach of the unconditional obligation to pay the agreed brief fee and on his allegations that another leading counsel had been engaged and that the respondent had practised a deception on him.

The statement of the case of the Law Society against the respondent repeated what was alleged in Mr Gray's statement of claim in the High Court. As a result of which, the Law Society formulated four charges against the respondent, as follows:

First charge

That you Peter Yap are guilty of grossly improper conduct in the discharge of your professional duty within the meaning of s 80(2)(b) or alternatively (h) of the Legal Profession Act (Chapter 161) in that you failed to pay the agreed brief fee of £50,000 (Pounds) due to counsel Mr Gilbert Gray QC and evidenced by a fee note dated 4 April 1986.

Second charge

That you Peter Yap are guilty of grossly improper conduct in the discharge of your professional duty within the meaning of s 80(2)(b) or alternatively (h) of the Legal Profession Act (Chapter 161) in that you on or about 3 March 1986 engaged the services of Mr Gilbert Gray QC as counsel for the defence in the case against Mr Tan Koon Swan without first informing him that Mr Clive Nicholls QC had already been retained as counsel.

Third charge

That you Peter Yap are guilty of grossly improper conduct in the discharge of your professional duty within the meaning of s 80(2)(b) or alternatively (h) of the Legal Profession Act (Chapter 161) in that you on or about 3 March 1986 engaged the services of Mr Gilbert Gray QC as counsel for the defence in the case against Mr Tan Koon Swan without discharging Mr Clive Nicholls QC who had been engaged prior to Mr Gilbert Gray QC.

Fourth charge

That you Peter Yap are guilty of grossly improper conduct in the discharge of your professional duty within the meaning of s 80(2)(b) or alternatively (h) in that on 25 March 1986 you lied and misled Mr Gilbert Gray QC into believing that other counsel had not been retained when other counsel had in fact been retained in the case against Mr Tan Koon Swan.

The Disciplinary Committee heard the matter for two days at their first sitting. The Law Society called only one witness, Mr Roy Kemp. The respondent gave evidence. On the only issue of fact in dispute, the Disciplinary Committee accepted the evidence of Mr Kemp that the respondent, contrary to his claims, did not inform Mr Kemp at any time that Mr Gray's services would not be required. This finding of fact is unchallenged but, in our view, it had hardly any materiality on the attitude of Mr Gray because from as early as the end of March 1986, long before 5 May 1986 when the Tan Koon Swan trial was scheduled to begin, he had thought and had acted on the basis that he was out of the case. Mr Gray had taken the view, quite erroneously as it turned out, that the respondent had surreptitiously engaged another counsel and that the respondent had deceived him about this. Further, and at any rate, by 4 April 1986 Mr Kemp had sent the fee note on the basis that Mr Gray would no longer be concerned with the Tan Koon Swan case.

No evidence was led before the Disciplinary Committee on the second, third and fourth charges. It inevitably followed that the respondent was found not guilty of those rather serious charges.

In relation to the first charge, the Disciplinary Committee, after hearing the evidence and submissions, indicated that they were finding as a fact 'that there was a binding agreement' between Mr Kemp and the respondent for Mr Gray to appear for the defence at the trial of Tan Koon Swan for a brief fee of £50,000 plus a refresher of £1,500 per day and the usual travelling and hotel expenses. The Disciplinary Committee went on to find that '(t)here was an understanding between them that in case Tan Koon Swan's trial was not proceeded with and Mr Gray's services were not required, the brief fee could be renegotiated, ie that the respondent would be entitled to ask for a reduction of the fee of £50,000'. The Disciplinary Committee then recognized 'that as this was essentially a dispute about the proper fee payable in the special circumstances of this case' and they took the view that it would not be out of order for the Committee to 'request' the respondent to make the effort to come to a settlement with Mr Gray. The chairman of the Disciplinary Committee addressed the respondent as follows:

> The Committee having heard the evidence is satisfied that you have agreed with Mr Kemp the clerk to Mr Gray that a brief fee of £50,000 is payable in respect of the TKS brief. At the time of the agreement there was an understanding that you could ask for a reduction of the fee in the event of a settlement.
>
> You have given a number of reasons for the failure to take up the matter of a reduction of the brief fee. One of the reasons given is your concern that such negotiation after the complaint had been lodged might be improper. The Committee is of the view that a genuine effort on your part to negotiate a reduction of the fee even at this stage would not be improper and would be a mitigating factor.
>
> The Committee is prepared to give you an opportunity to negotiate a reduction in the fee if you are so inclined. Would you like an adjournment to enable you to do so?

The hearing of the Disciplinary Committee was at the request of the respondent adjourned sine die. At the resumed hearing the following correspondence exchanged between the respondent and Mr Gray were produced. The respondent's letter of 25 April 1988 stated:

> Peter Yap & Co
> Advocates & Solicitors
>
> Mr Gilbert Gray
> 4 Paper Buildings
> Temple
> EL4Y 7EX
>
> Dear Mr Gray
>
> At the conclusion of the hearing of your complaint before the Committee, it was suggested that I could communicate with you to see whether we could agree on a sum to be paid to you regarding my instructions in March 1986 to lead the defence of my client, Mr Tan Koon Swan.
>
> My client as you may be aware pleaded guilty to a reduced charge, was fined $500,000 and sentenced to two years imprisonment. Upon his release from prison in Singapore in December 1987, he was immediately rearrested by the Malaysian authorities and after similar proceedings in Kuala Lumpur was again sent to prison this time for 2½ years. He is now serving his term and the fine of M$1,000,000 which was imposed on him remains unpaid.
>
> There are also pending against him, several civil actions from financial institutions and stockbroking firms both in Malaysia and Singapore and a bankruptcy petition has in fact been served on him by a judgment creditor.
>
> I must also inform you that I received no moneys to account of costs either in connection with your fees or my fees and I had myself expended on his behalf a fairly substantial sum of money by way of disbursements and other expenses. I have mentioned to Mr Roy Kemp at the Supreme Court Building in Singapore, at the conclusion of the abovesaid hearing, that if we had commenced negotiations upon receipt of my said letter of 28 April 1986, I might have been able to recover some fees from my client.
>
> In view of all the circumstances of this case I am unable to offer you more than £10,000 to settle your fees. The whole of the sum will of course have to come from my own resources. I hope that you will accept my offer.
>
> In addition I would like to take this opportunity to express my personal apologies to you.
>
> As I intend to keep the Committee informed of this development, all communications in this regard may be brought to their attention, if necessary.
>
> Yours faithfully
> Sgd Peter Yap

Mr Kemp replied on 5 May 1988 in the following terms:

Park Court Chambers
40 Park Cross Street
Leeds LS1 2QH
0532 433277

Mr P Yap
Peter Yap & Co
Advocates & Solicitors
14 Robinson Road
#02-01/02, 2nd Storey
Far East Finance Building
Singapore 0104

Dear Mr Yap,

Thank you for your letter of 25 April 1988. I have discussed the matter with Mr Gray.

Before booking Mr Gray you ought to have ensured that you were in funds to do so. Your present predicament is self-inflicted. You caused Mr Gray to return other well paid work in a cause celebre and in reliance upon you he altered his position to his great disadvantage. Furthermore, you told Mr Gray that you had not instructed other counsel when in fact you had.

The responsibility for the present position is yours, but Mr Gray and I feel that a payment by you of one-half of the agreed fee together with the expenses incurred by me in attending to give evidence in Singapore would be a fair and honourable compromise between two professional men.

I have forwarded a copy of this letter to Mr Arul for use at the adjourned hearing if necessary.

Yours sincerely
Sgd Roy Kemp
Clerk to Mr Gilbert Gray QC

The respondent did not give a prompt reply to Mr Kemp who wrote a further letter dated 12 May 1988 to the respondent as follows:

Park Court Chambers
40 Park Cross Street
Leeds LS1 2QH
0532 433277

Mr P Yap
Peter Yap & Co
Advocates & Solicitors
14 Robinson Road
#02-01/02, 2nd storey
Far East Finance Building
Singapore 0104

Dear Mr Yap

I have not received a reply to my letter of 5 May 1988.

I now have reason to believe that you have received considerable funds both from your client and from collections made on his behalf in Malaysia and that part of these funds, approximately M$220,000 was paid to you to cover counsel's fees. These could not have been for Mr Clive Nicholls QC because as you stated at the disciplinary hearing, his fees were paid direct by your client. It appears therefore that you have received payment of Mr Gray's fees.

In an endeavour to resolve this matter quickly before the adjourned hearing Mr Gray agreed to reduce his fees from £50,000 to £25,000. This is the very minimum fee Mr Gray would have expected if the case had been resolved at an early date and proper notice given and ignores the fact that you did not give proper notice or advise us of other counsel's involvement.

I have discussed this matter further with Mr Gray and notwithstanding the new information, he is prepared to allow the offer contained in my letter of 5 May to stand on your undertaking to return the balance of the fees received by you on his behalf to your client.

A copy of this letter has been forwarded to Mr Arul for use at the adjourned hearing if necessary.

Yours sincerely
Sgd Roy Kemp
Clerk to Mr Gilbert Gray QC

Counsel for the respondent before the Disciplinary Committee described the allegation that the respondent had received M$220,000 as 'scurrilous'. The Disciplinary Committee, quite rightly, declined to investigate Mr Kemp's allegation as this was not part of the case of the Law Society.

The Disciplinary Committee then considered the following passages regarding the responsibility of a solicitor for payment of counsel's fees. The Law Society of Singapore's Practice Directions and Ruling 1984 stated:

47 Responsibility for payment of charges of foreign solicitors instructed by Singapore law firms.

The Council's attention has been drawn recently as to the responsibility for payment of charges of foreign solicitors instructed by Singapore legal firms.

The Council would draw the attention of solicitors to the general rule that where a lawyer engages a foreign colleague he is responsible for the payment of the latter's charges unless there is express agreement to the contrary. This rule should always be followed in all cases where there is reciprocity as for example between Singapore and the United Kingdom and Singapore and Australia.

Para 1201 of 3 *Halsbury's Laws of England* (4th Ed) states:

Fees not legally recoverable

A barrister may complain to the Council of the Law Society if his fees are in arrear and he has been unable, after reasonable efforts, to obtain payment, irrespective of whether the solicitor has received money from the client for their payment; and while the Council will not act as a debt-collecting agency for barristers, it is prepared to consider complaints which might show that there has been a breach of etiquette. Where counsel delivers a fee list to a solicitor the fees should be paid or challenged within three months, whether or not the solicitor has been put in funds by his client or has taxed his costs.

Note 1. It is part of the etiquette of his profession that a solicitor is personally liable for the payment of a barrister's fees whether or not he has received money from his client to pay.

Cordery on Solicitors (17th Ed) p 307 states:

> The practice of solicitors
>
> A solicitor is personally responsible for payment of counsel's proper fees whether or not he has received the money from his client with which to pay the fees. Failure to pay counsel's fees is treated by the Council of the Law Society as a breach of professional conduct for which the usual sanctions apply. A solicitor who fails to pay counsel's fees, when the Council call upon him to do so, lays himself open to disciplinary action...

The professional liability of a solicitor for payment of counsel's fees is also stated by the Council of the Law Society of England in its publication 'The Professional Conduct of Solicitors' as follows:

> 16.06 Principle
>
> Except in legal aid cases, a solicitor is personally liable as a matter of professional conduct for the payment of counsel's proper fees, whether or not he has been placed in funds by his client.
>
> Commentary
>
> 1 In general, a barrister can only accept instructions through a solicitor. A barrister does not have a contractual relationship with the instructing solicitor or the client and therefore cannot sue for his fees. He is, however, entitled to demand payment of the fee with his brief except in legal aid cases.
>
> 2 In non-legal aid cases, where there is no special agreement, counsel's fees must be paid or challenged within three months of the delivery of the fee note at the conclusion of the case, whether or not the solicitor has been put in funds by his client or has taxed his costs. The Senate have issued guidelines relating to the appropriate procedures for obtaining prompt payment of barristers' fees.
>
> It should be noted that the non-payment of such fees may be raised as a matter of professional conduct and result in disciplinary action against the solicitor.

The determination of the Disciplinary Committee was put in the following terms:

> On the evidence before it, the Committee finds that the respondent's difficulties are of his own making. First of all, before booking Mr Gilbert Gray QC the respondent should have ensured that he was in funds to do so. This was especially so because the brief fee was the substantial sum of £50,000 and Mr Roy Kemp had made it quite clear that as the respondent was confirming the booking, the brief fee 'was now payable' because he would clear Mr Gray's diary for days on which Mr Gray was required in Singapore for the trial of Tan Koon Swan and reject the other equally substantial brief offered to Mr Gray in the 'Brighton Hotel bombing case' which was to be heard at or about the same time. In those circumstances, after confirming the booking of Mr Gray, it was imperative for the respondent to obtain straightaway sufficient funds from his client to meet this commitment. The respondent failed to do this.
>
> Secondly, when his client Tan Koon Swan decided to plead guilty, the respondent should have at once informed Mr Gray's clerk, Mr Roy Kemp, that Mr Gray's services would not be required. This again the respondent failed to do.
>
> When the respondent received the letter of 4 April 1986 from Mr Roy Kemp enclosing a fee note of £50,000 the respondent should have requested Mr Kemp for a reduction of the fee or made a counter offer on the ground that his client's trial did not proceed and Mr Gray's services were not utilized. This again the respondent did not do.
>
> The respondent knew very well that he was under an obligation to pay Mr Gray's brief fee of £50,000 and that as his client's trial did not go on and Mr Gray's services were not utilized, he was entitled to renegotiate and ask for a reduction in the fee but he made no effort at all to do so. The onus was on him to renegotiate and get a reduction of the brief fee which he had committed himself to pay. In the absence of renegotiation the fee payable remained at the full sum of £50,000.
>
> Accordingly, the Committee finds the respondent guilty on the first charge formulated against him by the Law Society which is as follows:
>
> 'First charge
>
> That you Peter Yap are guilty of grossly improper conduct in the discharge of your professional duty within the meaning of s 80(2)(b); alternatively s 80(2)(h) of the Legal Profession Act (Chapter 161), in that you failed to pay the agreed brief fee of £50,000 (Pounds) due to counsel Mr Gilbert Gray QC and evidenced by a fee note dated 4 April 1986.'
>
> The Committee finds the respondent not guilty on the second, third and fourth charges.
>
> For these reasons the Committee determines under s 90(1)(c) of the Legal Profession Act that cause of sufficient gravity for disciplinary action exists under s 80 of the Act. The Committee is conscious of the fact that during the course of these proceedings and at the suggestion of this Committee, the respondent did try, though unsuccessfully, to come to a settlement with Mr Gilbert Gray QC on the matter of his brief fee of £50,000 in an attempt to mitigate his misconduct. The Committee expresses no opinion on the offer and the counter offer made in the said attempt at settlement of the brief fee.
>
> As Mr Gray's brief fee remains unpaid the Committee considers the matter sufficiently grave to warrant disciplinary action. It is grossly improper conduct in the discharge of his professional duty for a solicitor to brief a Queen's Counsel, agree to his brief fee, confirm his booking, agree that 'the fee is now payable', cause him to give up other briefs, fail to inform him that his services will not be required and in the end fail to pay him his fee, not even a reduced fee which counsel was prepared to accept in full settlement. In the opinion of this Committee, the matter cannot be lightly treated and accordingly this is not a suitable case for a reprimand under s 90(1)(b) of the Legal Profession Act.

We agree with the Disciplinary Committee that solicitors should in their own interest and as a matter of prudence ensure that their lay clients had placed them in sufficient funds to meet their professional commitment unless they have good and sound reasons to believe that their lay clients are good for their money. It is a matter of judgment for them. We also agree that the respondent should have informed Mr Kemp as soon as it became reasonably clear that Mr Gray's services were

no longer necessary; but the delay in this case was inconsequential and would only have increased the amount of the reasonable fee to be negotiated. We also agree with the Disciplinary Committee that the respondent had a duty to negotiate in good faith with Mr Kemp acting for Mr Gray. But the intransigent and uncompromising attitude of Mr Gray, in our view, left no room for any meaningful negotiations. He believed that the respondent had replaced him with another counsel under what he believed to be reprehensible circumstances and that the respondent had been dishonest about it. His belief had no evidential foundations whatsoever. Mr Gray was also under a duty of honour to negotiate in view of the fact that the criminal case against Tan Koon Swan was not proceeding. Instead, he refused to accept that the criminal case was not proceeding to trial and he persisted, without any justification, in his allegation that another counsel had been retained to appear at the trial when, in truth and in fact, Tan Koon Swan had pleaded guilty and was sentenced to a term of imprisonment for two years.

When the Disciplinary Committee finally recognized that this was essentially a dispute over the amount of the fees payable and that the respondent should negotiate, Mr Gray's totally unreasonable response made any further negotiation impossible. He continued to assert as late as 5 May 1988 that the respondent had instructed another counsel. Most inexplicably, he also through Mr Kemp introduced a new allegation that in fact the respondent had received from or for the account of Tan Koon Swan the sum of M$220,000 to cover the fees payable to Mr Gray. Finally, Mr Kemp on his instructions offered to accept £25,000 on the respondent's 'undertaking to return the balance of the fees received to your client'. It was an impossible condition for the respondent to accept, unless he had received payment from or for the account of his lay client, and at the hearing before us there was absolutely not an iota of evidence that he had.

The misfortune encountered by the respondent stemmed from a failure on the part of Mr Gilbert Gray QC in conceding or at least mentioning at the first available opportunity that it was agreed that the fee would be negotiable if the criminal case did not proceed to trial. This failure was perplexing to us as the respondent had from the start of the controversy asserted that the fee was in the circumstances negotiable. This failure was not put right until the clerk of the QC disclosed for the first time in evidence under oath before the Disciplinary Committee that at the time of the retainer he had reached that understanding with the respondent. The Disciplinary Committee in spite of their finding as a fact that there was such a term in the retainer did not take into consideration the failure and refusal of the QC to negotiate with the respondent. Instead they misdirected themselves by finding that the respondent had failed to pay the agreed fee of £50,000. In a contract of honour it is as much a matter of honour to pay as it is no less a matter of honour to negotiate in the event of a condition subsequent coming to pass. The respondent did not fail to pay the fee because it was never payable; Mr Gilbert Gray QC, in fact, failed to negotiate in any meaningful way and we have to say that his overly robust response in the matter had stood in the way of a settlement of a reasonable amount of the fee.

Order accordingly.

Solicitors: *Lee & Partners*; *B Rao & KS Rajah.*

Reported by *Seah Min Wai*

Owners of Cargo lately laden on board the Ship or Vessel 'Kota Sejarah' v Owners of the Ship or Vessel 'Kota Sejarah'

HIGH COURT (SINGAPORE) — ADMIRALTY IN REM NOS 387 OF 1981 AND 870 OF 1980
CHAN SEK KEONG J
10 AUGUST 1990

Shipping — Bills of lading — Right of shipowners to tranship cargo after abandoning voyage — Interpretation of bill of lading clause

Tort — Conversion — Whether defendants entitled to tranship cargo against plaintiff's wishes under the terms of the bill of lading — Whether transhipment amounted to conversion

Tort — Detinue — Whether there was detinue because defendant refused to unload cargo despite plaintiffs' demand

Bailment — Whether cargo was lost without defendants' negligence — Onus of proof on defendants — Whether s 271 of Merchant Shipping Act (Cap 179, 1985 Ed) applicable — Merchant Shipping Act (Cap 179, 1985 Ed), s 271

The plaintiffs bought a cargo of jute from Thai sellers and resold the same to an Iranian-controlled German company for delivery at Khorramshahr, Iran. The defendants' ship Kota Sejarah loaded the goods against two clean bills of lading (KR-3 and KR-4), sailed from Bangkok on 6 January 1979 and arrived at Basrah, Iran, on 26 January 1979. Due to congestion caused by a stevedores' and port workers' strike on account of political unrest, the ship could not berth at Khorramshahr. After two weeks at Basrah, the defendants invoked cl 5 of the bills of lading, abandoned the voyage and selected Porbander, India as the port of discharge.

On 13 February 1979, the plaintiffs telexed the defendants that the Iranian buyers had rejected the invocation of cl 5 and held the defendants responsible for all consequences.

On 6 March 1979, the plaintiffs' director (PW1) met JM's director (DW1) (JM being the defendants' agent) and discussed various matters relating to the cargo. On 9 May 1979, the plaintiffs tried unsuccessfully to telex the defendants about the current position relating to the ownership of